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Nos. 70-161 and 70-5211

In the Supreme Court of the United States

OCTOBER TERM, 1971

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

RADIE WRIGHT, ET AL.

RADIE WRIGHT, ET AL., APPELLANTS

v.

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE SECRETARY OF HEALTH, EDUCATION AND WELFARE

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OPINION BELOW

The opinion of the district court (App. 95-103) is reported at 321 F. Supp. 383.

JURISDICTION

The order of the three-judge district court declaring 42 U.S.C. 425 unconstitutional was entered on Febru-

ary 12, 1971 (App. 104–105). Notices of appeal were filed on March 12, 1971 (App. 108–109), and the Court noted probable jurisdiction on October 12, 1971 (App. 111). The jurisdiction of this Court is conferred by 28 U.S.C. 1253.

QUESTION PRESENTED

Whether Section 225 of the Social Security Act, 42 U.S.C. 425, and the implementing procedures, under which disability benefit payments are suspended or terminated on the basis of wages reported by employers or written doctors' reports but without an oral hearing, are constitutional.

STATUTES AND REGULATIONS INVOLVED

Section 225 of the Social Security Act, 70 Stat. 817, as amended, 42 U.S.C. 425, and the relevant Department of Health, Education, and Welfare regulations are set forth in Appendix A to this brief, *infra*, pp. 35–56.

STATEMENT

Section 225 of the Social Security Act, 42 U.S.C. 425, provides that the Secretary may suspend social security disability benefit payments to an individual if he receives information leading him to believe that the individual is no longer disabled within the meaning of the Act.[1] The suspension remains in effect until

[1] Under Section 223(d)(1) of the Social Security Act, 42 U.S.C. 423(d)(1), disability is defined as "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." The Act further provides that any person who is actually engaged in substantial gainful activity cannot qualify as disabled. 42 U.S.C. 423(d)(4). Substantial gainful activity is defined in 20 C.F.R. 404.1532(b).

the Secretary determines whether to terminate or reinstate benefit payments; such a determination is made after a more thorough investigation to verify the individual's disability status.

1. Appellee-cross-appellant Radie Wright, a resident of the District of Columbia, applied for and was awarded social security disability benefits beginning in May 1966 (App. 24, 37–38). In late 1968 Wright returned to work and continued working through December of 1969, earning at least $4,440.81 (App. 25–26, 38–40). He did not notify the Social Security Administration of his return to work, although required to do so (App. 38, 47).[2] In 1970 the Administration discovered that earnings had been posted to Wright's earnings record for the years 1968 and 1969 (App. 38).[3]

Acting through its Washington, D.C., district office, the Administration then conducted an additional investigation (App. 38–39). A claims representative interviewed Wright, advised him that his right to receive disability benefits was being investigated and, upon his confirmation that he had worked during 1968 and 1969, further advised him that his benefits

[2] In item 21 of his application for benefits, Wright agreed to notify the Social Security Administration if he returned to work (App. 37). See 20 C.F.R. 404.1531.

[3] Employers are required by the Internal Revenue Code (Subtitle C, 26 U.S.C. 3101 *et seq.*) and regulations (Treas. Reg. 601.401 (1971)) to report quarterly to the Internal Revenue Service wages paid to all employees. These wage reportings are forwarded by I.R.S. to the Social Security Administration, whose Bureau of Data Processing and Accounts post each wage earner's quarterly earnings to his social security account.

would likely be stopped (App. 26, 38–39, 47). In addition, the district office verified most of Wright's employment through his former employers (App. 38–39). The Social Security Administration's district office then forwarded this information to the District of Columbia Department of Vocational Rehabilitation, which determined that Wright's disability had ceased because he had demonstrated his ability to engage in substantial gainful activity (App. 39).[4]

Upon a review of the D.C. Department's determination, the Social Security Administration's Bureau of Disability Insurance suspended Wright's benefits pursuant to 42 U.S.C. 425 pending verification of the remainder of his earnings record for purposes of a final decision on the termination of those benefits (App. 39–40). By letter of April 14, 1970, the Administration advised Wright of this action (App. 13).[5]

On May 13, 1970, Wright instituted the present class action for review of the administrative decision. He sought a declaration that Section 225 is unconstitutional and injunctive relief requiring the Secre-

[4] As of July 1969, Wright had exceeded the nine-month trial work period during which, under 42 U.S.C. 422(c) and 20 C.F.R. 404.1536, the disability of an individual entitled to disability benefits shall not be found to have ceased. The D.C. Department of Vocational Rehabilitation therefore concluded that Wright's disability had ceased in August 1969 (App. 39).

[5] By letter of April 10, 1970, to the Director of the Bureau of Disability Insurance, Wright's attorney stated that Wright was then unemployed and therefore relying on his benefits for support and urged that he be given a hearing prior to any suspension or termination of those benefits (App. 14–15).

tary to restore his benefits until he is afforded notice and opportunity for a fair hearing (App. 5–12). The district court subsequently entered a temporary restraining order requiring restoration of Wright's disability benefits (App. 32–33) and authorized Wright to maintain the suit as a class action (App. 86).

2. Appellee-cross-appellant John Atkins, Jr., a resident of Virginia, applied for and was awarded social security disability benefits beginning in July 1967 (App. 78, 89). He had entered the Perry Point, Maryland Veterans Administration Hospital in December 1966 for psychiatric treatment (App. 78–79, 89–90). In late 1969, the Social Security Administration discovered in an investigation[*] that Atkins had been discharged from the Perry Point Hospital, had briefly entered Western State Hospital at Staunton, Virginia, and was currently residing as a psychiatric patient in a lodge maintained in Roanoke, Virginia, by the Salem, Virginia, VA Hospital (App. 78–80, 89–90).

The Administration forwarded Atkins' file to the Virginia State Agency, which determined, on the basis of medical evidence obtained from the Western State and Salem Hospitals and an examination of Atkins by a consultant psychiatrist, that Atkins' disability had ceased as of January 1970 (App. 79–80, 90–91). Upon review, the Administration's Bureau of Disability In-

[*] At the time he applied for disability benefits, Atkins was advised that his discharge from the hospital might cause the Administration to reevaluate his entitlement to such benefits (App. 89–90). The Administration began its investigation when the Perry Point Hospital returned Atkins' August benefit check as undeliverable (App. 90).

surance approved the state agency's determination (App. 92), and by letter of February 3, 1970, advised Atkins of this determination and of the fact that his benefits would be terminated as of the end of March 1970 (App. 67). The letter further advised him of his right to reconsideration of the determination if he requested this within six months and his right to submit additional medical information (App. 67–68).

On February 4, 1970, Atkins wrote to the Social Security Administration, requesting reconsideration and stating that he was still a patient at the Salem VA Hospital (App. 69–70). Upon reconsideration, the Virginia State Agency determined, on the basis of statements submitted by Atkins and his clinical psychologist together with a re-evaluation of its consultant psychiatrist's report, that Atkins continued to be disabled (App. 93). The Administration's Bureau of Disability Insurance subsequently approved this determination and notified Atkins on April 29, 1970, that his benefits would continue (App. 73, 81, 93–94).[7] The Administration also advised Atkins that, because the medical evidence indicated his condition might improve, his disability status would be reviewed about September 1971 (App. 73).[8]

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[7] There was no break in the continuity of monthly disability benefits received by Atkins (see App. 93–94).

[8] On June 9, 1971, Atkins wrote the following letter to the Administration's district office in Roanoke (App. C, *infra* p. 59):

> On this date I accepted a Civil Service Job which pays $8500 per annum. My Social Security number is 246-12-5511.
>
> In view of the fact that this is my first employment since I was discharged from the V.A. Hospital, Salem, Va., I

On July 17, 1970, Atkins moved to intervene in the present case as a party plaintiff, claiming to be a member of the class in whose behalf the case was brought and alleging that in September 1971 he would again be subject to having his benefits terminated without a hearing (App. 52–63). The district court granted Atkins' motion (App. 86).

3. The three-judge district court held Section 225 of the Social Security Act unconstitutional because, under this Court's decision in *Goldberg* v. *Kelly*, 397 U.S. 254, due process requires that a beneficiary have "an opportunity to participate in the determination proceedings prior to the suspension of benefits" (App. 99). The court dealt only with the procedures for suspension and did not rule on the adequacy of procedures for termination, which might take place without a prior suspension (see pp. 18–19 *infra*).

Although recognizing that, with respect to welfare determinations, *Kelly* held that a fair hearing "must include [1] timely and adequate notice, [2] an opportunity for the recipient to present his case orally and [3] the right to confront and cross-examine adverse witnesses" (App. 99), the district court concluded that the third requirement would be necessary for disability cases only when the "recipient has submitted some evidence that contradicts that possessed by the Administration" (App. 101). For other cases, the court held that an "impartial decision maker," who cannot be the investigating officer who compiled the record, could render a decision after hearing the recipient's re-

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request that I be allowed to enter into a trial work period for the next nine months.

sponse and considering the evidence presented by him (App. 101 & note 17). The court made this distinction regarding the form of the hearing on the basis that disability determinations rest on evidence different from that relied upon for welfare determinations. Judge Matthews, dissenting in part, quoted this Court's statement in *Goldberg* v. *Kelly*, 397 U.S. 254, 268, that the recipient should be entitled to "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally" and expressed disagreement with "so much of the [district court's] opinion as seems to suggest that the procedural requirements of due process may be satisfied with something less than the 'opportunity' specified in *Goldberg*." (App. 103.)

The court's order provides for continued benefit payments to Wright and prohibits suspension of any social security disability benefits without affording the recipient adequate notice and opportunity to participate in the determination proceedings (App. 104–105). The court subsequently stayed the part of its order that prohibited future suspension of social security disability benefits (App. 110).[9]

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[9] The constitutionality of Section 225 has been upheld in *Messer* v. *Finch*, 314 F. Supp. 511 (E.D. Ky.) (three-judge court), vacated and remanded for dismissal as moot, 400 U.S. 987. The issue regarding a right to a hearing prior to suspension or termination of disability benefits is presented in a number of other cases: *Doyle* v. *Richardson* (C.A. 5, No. 31,104); *Moore* v. *Richardson* (N.D. Calif., Civ. No. C-70-2573); *Eldridge* v. *Richardson* (W.D. Va., Civ. No. 70-C-52-A) (dismissed May 6, 1971); *Dye* v. *Richardson* (W.D. Pa., Civ. No. 70-1384) (dismissed March 8, 1971); *Harvey* v. *Richardson*

ARGUMENT

INTRODUCTION AND SUMMARY

The "vast workings of the social security administrative system," *Richardson* v. *Perales*, 402 U.S. 389, 403, require millions of determinations each year that persons are no longer eligible for benefit payments, see note 29, *supra*. Thousands of these determinations involve persons receiving disability benefits. The Social Security Administration is deeply concerned with administering the disability program fairly for everyone. But it is also concerned with the practical needs of administration and the necessity of having the program function efficiently and effectively for those entitled to benefits. These goals must be reconciled.

The decision to suspend or terminate disability benefits is made on the basis of highly reliable information—wages reported by the beneficiary's em-

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(W.D. Pa., Civ. No. 70-1460); *Rodriquez* v. *Finch* (D. Colo., Civ. No. C-2294) (dismissed July 1, 1971); *Olivas* v. *Secretary of HEW* (D. Colo., Civ. No. C-3262). The issue is also presented in several nondisability cases: *Anderson* v. *Finch* (N.D. Ohio, Civ. No. 70-425, decided January 15, 1971, and pending before C.A. 6, No. 71-1317); *Garofalo* v. *Richardson* (S.D.N.Y., Civ. No. 70-5133) (remanded July 16, 1971); *Lindsay* v. *Richardson* (W.D. N.C., Civ. No. 2794); *Van Guilder* v. *Richardson* (D. Minn., Civ. No. 4-70-386); *Hopkins* v. *Richardson* (E.D. Pa., Civ. No. 71-37); *Shisslak* v. *H.E.W.* (D. Ariz., Civ. No. 71-35 TUC, decided April 9, 1971 and pending before C.A. 9, No. 71-2060); *Baker* v. *Finch* (N.D. Ga., Civ. No. 13786, decided September 13, 1971); *Corona* v. *Richardson* (N.D. Calif., Civ. No. 70-2662); *Recide* v. *Richardson* (D. Hawaii, Civ. No. 70-3426); *Mills* v. *Richardson* (N.D. N.Y., Civ. No. 71-CV-208, decided October 15, 1971).

ployer or written medical reports. Cf. *Perales*, *supra*. The requirements of due process in suspension or termination proceedings are satisfied if the beneficiary has a fair opportunity to contradict or contest anything prejudicial to his position before a decision is reached. In our view, beneficiaries have such an opportunity if they are given timely notice of the evidence against them and the chance to respond in writing by presenting their own evidence and arguments before any adverse action is taken. Such a "hearing on paper" satisfies due process in the context of suspensions or terminations for disability benefits since the evidence upon which these actions are taken—wage postings or medical reports—is highly reliable and not of a type that draws into issue veracity or credibility.

A requirement that evidentiary hearings should be held before any suspensions or terminations occur would necessitate massive restructuring of the entire disability program, would bring about duplication in staffing between State and federal agencies of the highly trained personnel needed to make these decisions and would result in losses to the Social Security Trust Fund of nearly $16 million per year for disability cases and still greater sums when all Title II programs are considered. This kind of voluminous and drastic revamping of a functioning program serving 100 million people each year is not required by the Constitution. Written submissions not only ensure that beneficiaries have their entitlement to disability benefits determined fairly and accurately, but also allow reconciliation of

the need for fairness with the needs of practical administration. In these circumstances, due process requires no more.

I. THE PROCEDURES PRESENTLY FOLLOWED IN SUSPENDING AND TERMINATING DISABILITY BENEFITS UNDER SECTION 225

Pursuant to Section 221 of the Act, 42 U.S.C. 421, as amended, the Secretary has entered into agreements with each State (including the District of Columbia) under which a State agency, subject to review by the Secretary, makes the initial determination whether a claimant is under a disability, when it began, and whether a beneficiary's disability has ceased and when (20 C.F.R. 404.905 (c) and (d), 404.1520). These State agencies are generally centralized in one office in each State.[10] As the legislative history of the Social Security Amendments of 1954 indicates, State agencies were utilized because they had well-established relationships with the medical profession and would thereby remove the major case load from the Social Security Administration. H.R. Rep. No. 1698, 83d Cong., 2d Sess., at 23–24 (1954).

By agreement, all State agencies apply the same standards in evaluating the severity of impairments, thereby insuring equal treatment of all disabled individuals. Under these agreements, the Secretary upon review of a State agency's conclusion that disability

[10] The Missouri and Florida agencies have 5 offices each; Louisiana has 3; and California has 2. All of the agencies in the other States have only one office. Disability Insurance State Manual, Appendix D.

has ceased may require the agency to reconsider its finding in order to conform with these uniform standards.[11] Review of State agency determinations is performed by a trained Disability Examiner at the Social Security Administration's Bureau of Disability Insurance, which is located in Baltimore, Maryland.

Disability determinations are thus made in two steps: first by the centralized State agency, and then by the Bureau of Disability Insurance of the Social Security Administration in Baltimore.

Implicit in the disability insurance scheme established by Title II of the Social Security Act is the obligation of the Secretary to terminate an individual's disability benefits when he no longer is under a disability as defined in the Act.[12] This administrative obligation has given rise to the Social Security Administration's "continuing disability investigation" procedures, by which the Bureau of Disability Insurance periodically re-evaluates beneficiaries to determine whether their disabilities continue.[13] Under those procedures, a continuing disability investigation of a particular beneficiary is initiated upon the receipt of information indicating that he no longer is disabled. Such an investigation is always initiated (a) when the

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[11] The Secretary's authority to review determinations by State agencies in order to assure uniform administration was reiterated in subsequent legislative history. H.R. Rept. No. 2936, 84th Cong., 2d Sess., at 26 (1956).

[12] See, *e.g.*, 42 U.S.C. 416(i)(2), 422(c) and 423(a)(1).

[13] See, *e.g.*, 20 C.F.R. 404.1528. The continuing disability investigation procedures are set forth in detail in the Administration's Claims Manual, §§ 6700 *et seq.*, a copy of which has been filed with this Court.

beneficiary reports that his condition has improved, that he has returned to work, or that he has been released from a hospital;[14] (b) when notice is received that the beneficiary's address has changed from a hospital to a private residence; (c) when an employer reports wages that have been earned by the beneficiary (see note 3, *supra*); or (d) when a scheduled medical examination of the beneficiary shows that he is no longer disabled.[15]

Upon receiving such information, the Social Security Administration's Bureau of Disability Insurance will instruct the Administration's local district office to conduct an investigation. In the past, as part of the investigation, the district office attempted to interview the beneficiary personally. However, for situations involving wage postings and medical re-examinations, the Bureau or the State agency will get in touch with the beneficiary by mail pursuant to a recent experimental procedure designed to relieve the overburdened district offices (Claims Manual, §§ 6710, 6730).[16]

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[14] The regulations require a disability beneficiary to notify the Administration promptly if his condition improves, if he engages in any work activity or his earnings from work increase, or if he is discharged from a hospital or similar institution (20 C.F.R. 404.1531).

[15] See § 6705 of the Claims Manual. As noted in § 6705(f), medical re-examinations are scheduled in the future in those cases in which current medical evidence shows that the beneficiary's disability may eventually cease.

[16] Prior to July 1969, with regard to beneficiaries for whom medical re-examinations were scheduled, and prior to August 1970, with regard to beneficiaries for whom the Bureau received wage postings, personal interviews were always conducted. After those respective dates, however, because of over-

As a result of its investigation, the district office may request the Bureau to suspend an individual's benefits in any of the following situations: (1) the beneficiary possibly has recovered, considers himself no longer disabled, and has been employed full-time with his doctor's permission at his former occupation for at least two consecutive calendar months; (2) the beneficiary possibly has recovered, is working at an occupation other than his former work and states that he has been working full-time for at least two consec-

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burdened district offices, the Administration instituted experimental procedures. Under those procedures, in place of the district office interview, each beneficiary to be medically reexamined is contacted by the State agency by mail and each beneficiary for whom wage postings have been received is contacted by the Bureau of Disability Insurance by mail and is asked to furnish in writing certain information, including: (1) whether he has seen a doctor or has been hospitalized within the past six months and, if so, the name, address and phone number of his doctor or the hospital; (2) whether he is receiving vocational rehabilitation services and, if so, the name and address of his rehabilitation office and counselor; (3) whether he has worked in the past year and, if so, the name, address and phone number of his employer, the kind of work he has done and when he began, his average hours worked and average gross earnings; (4) whether he is still working and, if not, the date he stopped; and (5) whether his doctor agreed that he should work. Each beneficiary is also advised to call or visit the nearest district office if he has any questions. If any such beneficiary fails to respond to the written inquiries of the State agency or the Bureau, the local Social Security Administration district office will be instructed to get in touch with him (Claims Manual, §§ T6705, T6706, T6709; SSA Disability Insurance Letter Nos. III–9, with attached form SSA–9577, and III–10, all of which have been filed with this Court).

utive calendar months; (3) the beneficiary's nine-month trial work period has ended (see note 4 *supra*, and Claims Manual, § 6703) and he has been engaged in substantial gainful activity or earning more than $140 a month in eleven or more months; (4) a beneficiary who is not entitled to a trial work period (see Claims Manual, § 6703.2) states that he is working full-time and has been engaged in substantial gainful activity or earning more than $140 a month in at least two consecutive calendar months; or (5) the beneficiary refuses to cooperate with the Administration (Claims Manual, §§ 6732, 6734, 6742). In those cases in which the beneficiary has returned to work, the district office will attempt to develop the details of his work activity (Claims Manual § 6712). If the district office decides to request suspension, it must "inform the beneficiary so he can prepare himself for the check stoppage" (Claims Manual, § 6708).[17]

After completing its investigation, the district office will forward all the information it has compiled together with the beneficiary's claims file to the appropriate State agency for a determination whether his disability has ceased and, if so, the month in which it ceased (Claims Manual, §§ 6701, 6732, 6734, 6740,

[17] If the Bureau possesses the required verified information, such as when it has contacted the beneficiary by direct mail (see note 16, *supra*), the Bureau may suspend benefits before sending the case to the local district office for any further factual development (Claims Manual, § 6708). The Bureau will not suspend or terminate benefits on the basis of work or wage information without first going through the district office unless such information is supplied by the beneficiary.

6742). Before making this determination, the State agency will obtain all the necessary medical evidence of the beneficiary's current condition (Claims Manual, § 6701(b); 20 C.F.R. 404.1527, 404.1528). A beneficiary's disability will be found to have ceased: (1) as of the first month, after expiration of his nine-month trial work period, in which the evidence establishes that he has returned to or is able to engage in substantial gainful activity; (2) if he is not entitled to a trial work period, as of the first month in which he engages in substantial gainful activity; or (3) as of the month in which the evidence establishes that medical recovery has occurred (Claims Manual, § 6706; 20 C.F.R. 404.1539).[18] A State agency's determination that the beneficiary is no longer disabled must be supported by specific findings and conclusions (20 C.F.R. 404.905(d)). If a finding is made that a beneficiary's disability has ceased, the State agency may request the Bureau to suspend his benefits in order to prevent overpayments pending a decision on termination.

The State agency will then forward its determination of disability continuance or cessation to the Administration's Bureau of Disability Insurance for review (42 U.S.C. 421(c); Claims Manual, § 6701(b) and (c)). If not already ordered, the Bureau if war-

[18] Additionally, a beneficiary's disability will be found to have ceased: (4) as of the month in which it is determined that, despite reasonable effort, the beneficiary cannot be located and that there is a reasonable possibility that his disability has ceased; or (5) as of the month it is determined that a beneficiary will not cooperate (after a personal interview) and there is a question of continuing disability (Claims Manual, § 6706).

ranted may suspend a beneficiary's benefits while the State agency determination is pending for review before it, such as when the State agency has determined that his disability had ceased more than two months earlier (42 U.S.C. 423(a)(1)(D)). Whether upon the request of the district office or the State agency or upon the initiative of the Bureau, benefits are suspended only when it appears necessary to prevent overpayment pending final administrative determination of the beneficiary's disability (Claims Manual, § 6708). The Bureau may approve the initial State agency determination, determine that the beneficiary's disability ceased on a date earlier than that found by the State agency, or determine that the case requires further factual development (42 U.S.C. 421(c); 20 C.F.R. 404.1520; Claims Manual, § 6701(c)). The beneficiary will be notified by the Bureau of its final determination (Claims Manual, § 6701(c)).

Upon a Bureau determination that a beneficiary's disability has ceased, actual benefit payments are not terminated until two months after the month in which the disability is found to have ceased (42 U.S.C. 423(a)(1)(D); Claims Manual, § 6707). If benefits were suspended before being terminated, the beneficiary is nevertheless entitled to payments for all months through the second month after the month in which his disability is found to have ceased (*id.*).

Under the Act and regulations, a Bureau decision terminating (as opposed to suspending) a beneficiary's disability constitutes an "initial determination," which the beneficiary may challenge through the es-

tablished administrative and judicial hearing procedures (42 U.S.C. 421(d); 20 C.F.R. 404.905–404.951 and 404.1520–404.1522). These procedures, which are the same as those followed when the Bureau initially determines that an applicant is not disabled, entitle an aggrieved beneficiary, upon written requests filed within six months, to reconsideration of the initial determination and, after reconsideration, to a *de novo* evidentiary hearing (20 C.F.R. 404.909–404.940). A beneficiary is thereafter entitled, upon a written request filed within sixty days, to review of the hearing examiner's decision by the Appeals Council (20 C.F.R. 404.941–404.951), and to judicial review of the final administrative determination if he files suit in a federal district court within sixty days (42 U.S.C. 405 (g)).[19] If the initial determination of the Bureau of Disability Insurance is subsequently reversed and reinstatement of benefits is ordered, corrective payments back to the date of suspension or initial termination are made.

In sum, decisions regarding continuing disability are made first by the State agency and then by the Administration's Bureau of Disability Insurance; in these proceedings the Administration's district offices act in an investigatory capacity. During the proceedings, the Bureau, in order to prevent overpayments, may order suspension of disability benefits on its own initiative or upon the suggestion of the State

[19] A beneficiary may be represented before the Social Security Administration by any practicing attorney or other qualified person at any stage of the entire proceedings, including before an initial determination is made (20 C.F.R. 404.971–404.972).

agency or the district office. But suspension is simply a step frequently, but not always, taken while a decision is being reached regarding whether benefits should be terminated. Under the Act, the responsibility for making the initial decision on whether to terminate rests with the State agencies, subject to limited review at this stage by the Bureau of Disability Insurance. The decision itself rests upon verified wage postings to the beneficiary's account over a substantial period of time or upon medical reports indicating that the beneficiary has recovered. After the initial determination to terminate is made, the Bureau, upon the beneficiary's request, reconsiders the determination; and if the beneficiary is still dissatisfied he is then entitled to an evidentiary hearing before a hearing examiner.

In our memorandum in response to co-appellants' jurisdictional statement we pointed out that intervenor Atkins was the only party in this case who had had his benefits terminated (as distinguished from suspended), that his benefits had been reinstated before the district court's decision, and that the district court decided only the constitutionality of the suspension procedure. In view of this, we suggested that any question regarding the procedures for termination of benefits was moot. Compare *Messer* v. *Finch*, 314 F. Supp. 511 (E.D. Ky.), vacated and remanded for dismissal as moot, 400 U.S. 987.

However, since the procedures leading to suspension and those leading to termination, with or without a prior suspension, are the same, see pp. 11–18 *supra*, the district court's decision holding Section 225 unconstitutional necessarily affects both actions. Our

discussion, therefore, is not limited to the procedures for suspension since, in our view, this Court's determination of the constitutional adequacy of the procedures themselves would also affect both suspensions and terminations of benefits. In sum, although we would still contend that questions regarding termination procedures are moot if these were the only issues in the case, in the special circumstances presented here we believe that the constitutionality of the procedures both for suspension and termination must be considered. For these reasons, we withdraw our suggestion of mootness.

II. THE CONTINUING DISABILITY INVESTIGATION PROCEDURES SATISFY DUE PROCESS

Section 225 permits the Secretary to suspend disability benefit payments if, on the basis of evidence obtained by or submitted to him, he "believes that an individual entitled to [disability insurance] benefits * * * may have ceased to be under a disability," 42 U.S.C. 425, and benefits must be terminated if the Secretary finds that the beneficiary is in fact no longer under a disability, 42 U.S.C. 416(i)(2), 422(c), 423(a)(1). Section 225 was intended to protect the disability benefit program by giving the "Secretary ample power to administer the program on a careful, practical, and economical basis" (102 Cong. Rec. 13039 [remarks of Senator George]).[20] In order to effectuate these goals the Secretary adopted the

[20] See H.R. Rep. No. 1189, 84th Cong., 1st Sess., at p. 30 (1955).

procedures comprising the continuing disability investigation. These procedures therefore provide the basis upon which the constitutionality of Section 225 should be assessed, cf. *Rosado* v. *Wyman*, 397 U.S. 397, 415; *Zemel* v. *Rusk*, 381 U.S. 1, 11, and the framework within which the due process issue should be considered. See 42 U.S.C. 405(a).

Every claimant is advised when notified of the initial award of disability benefits that, if his condition improves to the extent that he is no longer unable to engage in substantial gainful employment, his benefits will cease.[21] Thereafter, upon receipt by the Social Security Administration of any information indicating that a beneficiary no longer is disabled, the beneficiary is personally interviewed by the district office or, under the experimental procedures applicable to wage postings or medical re-examinations, by mail by the Bureau of Disability Insurance or the State agency, respectively, in order to verify the information relating to his disability that the Administration has received.[22] At this time, the beneficiary is asked to furnish detailed information regarding his medical condition and work efforts. If wages have been posted to his account, he is asked to verify that those postings in fact reflect his earnings. Should there be indications that the beneficiary's condition

[21] This advice is contained in a pamphlet setting forth the rights and responsibilities of disability beneficiaries sent by the Social Security Administration to each beneficiary, a copy of which we have filed with the Court.

[22] See note 16 *supra*.

has improved, reports of any recent examinations are obtained from his physicians, and ordinarily he is also examined by a consultant physician. Only after it has been confirmed that a beneficiary has been working full time for a substantial period, has recovered, or has refused to cooperate will his benefits be suspended or terminated.[23]

In deciding to suspend or terminate benefits, the Secretary acts upon the basis of information of "reliability and impartiality" that has "probative worth" (*Richardson* v. *Perales*, 402 U.S. 389, 403, 405)—reports of earnings routinely submitted to the Administration and written medical reports by doctors who have examined the beneficiary. As we explain below, the beneficiary will be informed of the basis upon which the Administration is considering such action, and will be permitted to rebut the information.

We do not challenge the district court's decision insofar as it requires timely notice to the beneficiary of the proposed suspension and of the information on which it rests. In accordance with that decision, the Secretary, in order to afford reasonable notice and opportunity to participate in the determination proceedings, will adopt a procedure whereby the individual will be informed of the proposed adverse action and the information upon which it is based and will be given the opportunity to respond in writing before adverse action, if any, is taken.

We do, however, challenge the district court's hold-

[23] In addition, disability benefits are terminated for death or attainment of age 65 (in which case, old age benefits become payable). 42 U.S.C. 423(a)(1)(D).

ing that due process further requires a formal hearing whenever the beneficiary's evidence conflicts with the Administration's, and a somewhat less "formal" hearing before an "impartial decision maker," without medical personnel or employers required to be present, in all other cases (App. 99–101). For the reasons that follow, we also disagree with the contention that due process requires even more, that is, that in all cases it compels an evidentiary hearing of the same scope required for welfare recipients in *Goldberg* v. *Kelly*, 397 U.S. 254.

1. In many situations the right to a hearing comprehends an oral presentation at which the party may present evidence and confront and cross-examine witnesses. This is essentially what *Kelly* required with respect to the termination of welfare benefits, 397 U.S. at 266–271. But due process does not necessitate "judicializing" administrative action to this extent in all situations. See *United States* v. *Nugent*, 346 U.S. 1, 9. The requirements of due process "frequently vary with the type of proceeding involved," *Hannah* v. *Larche*, 363 U.S. 420, 440. In our view, due process can be satisfied in appropriate areas of administrative action if the party is given the opportunity to submit objections and arguments in writing. Whether such a "hearing on paper" is adequate depends on the nature of the evidence usually involved and on a reconciliation of the practical needs of administration with the interests of the party affected. See *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895; see generally Note, *The Supreme Court, 1970 Term*, 85 Harv. L. Rev. 326–334 (1971).

What matters is substance, not form. The proper inquiry is whether the party has been afforded a fair opportunity of correcting or contradicting anything prejudicial to his view before a decision is reached."[24] As to suspensions or terminations of disability benefits, where the information against the beneficiary is highly reliable and will be known to him, such a "fair opportunity" can be afforded through written submissions, without the need for oral presentation.[25] This opportunity before the disability determination is made, together with the right to reconsideration and a formal, evidentiary hearing after the determination (see pp. 17–18 *supra*), satisfies due process.

Where suspension or termination results from a medical determination that the disability has ceased, this rests upon reports of medical examinations whose reliability this Court recently recognized in *Richardson* v. *Perales*, 402 U.S. 389. There this Court held that written reports of licensed physicians who had examined the claimant could constitute substantial evidence supporting a determination of no disability,

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[24] "The fundamental requisite of due process of law is the opportunity to be heard," *Grannis* v. *Ordean*, 234 U.S. 385, 394, "at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (quoted in *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 267).

[25] Compare *Gonzales* v. *United States*, 348 U.S. 407, 412, where the Selective Service Appeal Board, which classifies registrants *de novo* on the basis of written submissions, received a report from the Department of Justice. The Court held that the registrant need only be given a fair opportunity to reply in writing to the Justice Department's report, which was based in part on an interview of the registrant. See also *Simmons* v. *United States*, 348 U.S. 397.

even though the physicians had not testified and therefore could not be cross-examined. The Court based its decision on a number of factors that assured the underlying reliability and probative value of such reports, including the impartiality of the consulting physicians, and on the administrative burden in terms of cost and time that would result from requiring live testimony. 402 U.S. at 402–406. Similarly, the determination that the recipient has sufficient earnings to indicate that he is no longer disabled rests upon regular reports made by his employers to the government; the accuracy of these is verified by the beneficiary or his employer before the Administration acts. See p. 15 *supra*.

The basis upon which disability benefits are suspended or terminated thus differs significantly from that upon which the terminations of welfare benefits involved in *Goldberg* v. *Kelly, supra,* rested. The decision to terminate welfare benefits may result from personal and social situations brought to the attention of the authorities by tips, rumor or gossip. One of the recipients in *Kelly,* for example, had been cut off because of her alleged failure to cooperate with welfare authorities in suing her estranged husband; payments to another were terminated because of alleged drug addiction. 397 U.S. at 256, n. 2. Thus, the Court pointed out that "Particularly where credibility and veracity are at issue, as they must be in many [welfare] termination proceedings, written submissions are a wholly unsatisfactory basis for decision." *Id.* at 269. And in concluding that confrontation

and cross-examination are required, the Court, *id.* at 270, relied upon the following statement from *Greene* v. *McElroy*, 360 U.S. 474, 496–497,

> [T]he evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals where memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.

While these observations describe the situation for termination of welfare benefits, they are wide of the mark with respect to suspension or termination of disability benefits. As we have indicated above, social security disability payments are suspended only on the basis of an objective consideration—that the previous disability has ceased—and that conclusion rests on reliable information.[26] The disability beneficiary is afforded a fair opportunity to controvert so long as he is given notice of it and can respond in writing, even with the assistance of counsel if he wishes. See note 19 *supra*. Unlike the situation in *Kelly*, the credibility or veracity of the doctors and employers, upon whose reports the proposed action is based, will not be in issue.

To be sure, of 38,000 determinations each year that a beneficiary's disability has ceased, 5000 or 13 percent

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[26] The Claims Manual specifically directs that "[b]enefits should not be suspended based solely on a report from an informant" (§ 6708).

are reversed upon reconsideration by the Bureau of Disability Insurance or after a hearing before a hearing examiner (App. B, *infra*, pp. 57–58). But this does not show that these determinations were based on unreliable evidence. Rather, these figures simply illustrate an obvious and unavoidable fact about all adjudications: judgments on the evidence will sometimes vary. Moreover, the fact that 37 percent of the 11,000 requests for reconsideration result in reversals by the Administration of the initial determination that disability has ceased "attests to the fairness of the system and refutes the implication of impropriety", as this Court pointed out in *Perales, supra,* 402 U.S. at 410, with respect to a comparable reversal rate for initial diasbility determinations. The fairness of having cessations of disability initially determined on the basis of written submissions is further illustrated by the fact that these reversals upon reconsideration are themselves based only on written submissions by the beneficiary (see 20 C.F.R. 404.913–404.914). Particularly in view of the vast disruption of the Social Security system that would result from requiring oral hearings before any suspension or termination of benefits (see below), the opportunity to make such written submissions fulfills the requirements of due process. See note, *supra,* 85 Harv. L. Rev. at 332–334.

2. Requiring that the beneficiary be permitted to participate in the pre-suspension determination proceedings in some more formal or comprehensive manner would require massive restructuring of the existing administrative adjudicative process. Cessation of

disability determinations are now made in two steps: initially by the State agency, after the Social Security Administration has conducted its investigation, and then by the Administration's Bureau of Disability Insurance on review. This arrangement not only makes possible the necessary concentration of personnel qualified to make the specialized medical and vocational evaluations required in disability cases, as Congress intended (see p. 11 *supra*), but also permits the Administration to staff its numerous district offices—which exceed 700—with individuals who, although trained to obtain medical and other relevant data from beneficiaries and claimants, do not have to be qualified to make medical judgments of the sort required in an adjudication of disability.

As noted above in point I, the district office on the basis of its investigation may recommend to the Bureau of Disability Insurance that the beneficiary's benefits be suspended, and the State Agency may make a like recommendation to the Bureau on the basis of its determination that the disability has ceased. The district office makes no finding that disability has ceased. Under the Act, that is reserved to the State agency and the Bureau of Disability Insurance, on the basis of which the latter may suspend and then terminate benefits or just terminate them. See 42 U.S.C. 421.

The district court ruling, however, would require that the beneficiary be allowed to participate in either the State agency determination proceedings or the decision of the Bureau of Disability Insurance, which is located in Baltimore, Maryland. It either would re-

quire the beneficiary to travel great distances or would necessitate that State or federal officials travel to the area in which the beneficiary resides, neither of which is practical. Nor could the decision-making function be turned over to the Administration's district offices, which are located conveniently to the beneficiaries, without staffing them with individuals qualified to make the necessary medical and vocational judgment. The district offices are already heavily overburdened and, cognizant of this, the Administration recently initiated experimental procedures in order to streamline disability investigations (see note 16 *supra*).

If the present system is revamped by turning over the decision-making function to the district offices, this would necessitate the duplication, on a vast scale, of the personnel already staffing State agencies, and would make uniformity and consistency in the administration of the program all but impossible. The district court's decision, or the position advocated by co-appellants, would therefore require vast revisions in the present procedures, which are designed to effectuate the statutory allocation of functions prescribed by Congress.[27] See 42 U.S.C. 421, and p. 11 *supra*.

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[27] In contrast to the Title II disability program involved here, which is a federally administered program, the program under Titles I, IV-A, X, XIV, XVI, and XIX of the Act, for which the Secretary has issued regulations requiring pre-termination hearings (45 C.F.R. 205.10, 36 Fed. Reg. 3034–3035), are all state programs administered by the state at the state and local level for which the federal government merely provides financial grants. The administration of Title II, a federal program, is centralized.

The adverse effects of the district court's decision, if upheld, would not be confined merely to the disability program. The non-disability programs administered under Title II of the Act by the Social Security Administration would similarly be severely disrupted. Pursuant to Section 203(h)(3) of the Act, 42 U.S.C. 403(h)(3), the benefits of an old age or other non-disability beneficiary may be suspended by the Secretary if he determines, on the basis of information obtained by or submitted to him, that the beneficiary's earnings may reasonably be expected to exceed the statutory ceiling. And under Section 204 (a), 42 U.S.C. 404(a), when the Secretary finds that an overpayment has been made to any person under Title II, the Secretary shall require refunds or shall recoup the overpayment out of subsequent benefits due to the individual.

In each of these Title II non-disability programs, the decision-making process has been centralized in six payment centers located in New York, Philadelphia, Chicago, Birmingham, Kansas City and San Francisco. Therefore, affirmance of the district court holding may well require the wholesale reorganization of these programs in a manner similar to that which would be required for the disability program.

The burden that the rule announced by the district court would impose upon the Title II programs and the Social Security Administration would thus be enormous, both administratively and financially. In fiscal 1969, there were approximately 40,000 determinations that disability had ceased (App. 34). For fiscal 1971,

there were 3,167 cessations of disability per month, including 2000 suspensions of benefits. If suspensions were delayed for only 2 months, the cost per year would be nearly $5,000,0000; if terminations were delayed for the same period the cost per year would be nearly $16,000,000.[28] This money would have to come out of the Social Security Trust Fund, 42 U.S.C. 401, thereby reducing the amount available for payment of benefits.

But this is only the tip of the iceberg. The cost of decentralizing the disability program, of staffing more than 700 district offices with highly trained personnel and of conducting a vast number of additional evidentiary hearings must also be added. Moreover, as we have indicated above, the district court's decision has implications for all of the other programs under

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[28] The Social Security Administration has estimated the following for disability cases in 1971:

Suspensions per month under 42 U.S.C. 425	1,100
Reinstatements per month after suspensions	100
Cessations per month after suspensions	1,000
(Processing time between suspension of benefits and a restatement of cessation is 57 days)	
Cessations per month without prior suspensions	2,167
Total cessations per month	3,167
Average monthly benefit paid per terminated case	$207
Cost per year of delaying all suspensions for 1 month (1,000 cases × $207 per month × 12 months)	$2,484,000
Cost per year of delaying all suspensions for 2 months (1,000 cases × 2 × $207 per month × 12 months)	$4,968,000
Cost per year of delaying all cessations for 1 month (3,167 cases × $207 × 12)	$7,866,828
Cost per year of delaying all cessations for 2 months (3,167 cases × 2 × $207 × 12)	$15,733,656

See also App. 34, where the Administration estimated the cost of delay for 1 month as approximately $10,000,000.

Title II in addition to the disability benefit program. The total number of terminations of benefits in 1969 for all Title II programs likely to be affected by the district court's decision was 515,189, including 38,000 cessations of disability.[29] It is apparent that the cost of delaying even a small percentage of this number of terminations of benefits per year, not to mention the cost of revamping the structure of the Social Security

[29] Social Security Bulletin, Annual Supplement at p. 111:

TABLE 108.—BENEFITS TERMINATED: NUMBER, BY REASON FOR TERMINATION AND TYPE OF BENEFICIARY, 1969

Reason for termination	Total	Retired workers	Disabled workers	Wives and husbands	Children	Widowed mothers	Widows and widowers	Parents	Special age-72 beneficiaries
Total	2,980,287	827,151	251,269	299,889	946,481	107,119	205,188	3,525	119,865
Death of beneficiary	1,285,744	778,284	108,762	90,294	9,976	3,012	182,204	3,462	109,800
Death of spouse or disability beneficiary	264,291			206,794	57,597				
Marriage, remarriage, or divorce of beneficiary	99,282			3,474	53,254	30,556	11,978	10	
Marriage, death, or adoption of last entitled child	7,032			3,122		3,910			
Attainment of age 18 by beneficiary	298,699				298,699				
Attainment of age 65 by disability beneficiary	123,530		93,465	17,766	12,299				
Attainment of age 18 by last entitled child	107,486			44,622		62,864			
Entitlement to equal or larger benefits [1]	109,581	29,242		12,208	15,927	4,437	28,352	21	9,394
Recovery [2] of disability beneficiary or of last entitled child	99,735		38,108	13,464	47,826	241	96		
Recovery [2] of disabled child	1,592				1,592				
Withdrawal of application	6,506	4,920	51	736	584	60	229	1	15
Attainment of age 22 by student	68,981				68,981				
Beneficiary no longer a full-time student	222,840				222,840				
Other	84,708	4,725	10,883	7,229	44,805	2,939	2,329	31	656

[1] Benefits payable to retired workers aged 62-64 pending determination of disability upon entitlement to a higher benefit.

[2] Disabled person ceased to meet medical standards for disability or continued to meet medical standards for disability but engaged in substantial gainful activity.

In reaching the figure of 515,189 in the text, we have subtracted all terminations for death, attainment of age 18, 22 or 65, withdrawal of application, or entitlement to equal or larger benefits, since in our view the district court's decision would have little effect on the processing of these cases.

program to comply with the district court's order, would be very great.

The Social Security Administration is no less concerned than are the co-appellants about fair treatment of the beneficiaries for whom it administers the disability program. But it is also concerned with the practical needs of administration, with the necessity for efficient and effective operation of a vast benefit program affecting millions of persons and involving millions of determinations each year. As this Court recognized in *Perales, supra*, 402 U.S. at 399, "Such a system must be fair—and it must work."

We do not suggest that the district court's decision will necessarily cause a collapse in the administration of the disability benefit program, or of Title II programs in general. But the Constitution does not require that additional procedures must be engrafted on a functioning program until the brink is reached. The important issue is whether, in light of the nature of the evidence involved and a reconciliation of the interests of the persons affected with administrative interests, due process is satisfied by a procedure that affords each beneficiary adequate notice of the proposed suspension or termination and the evidence on which this is based, together with the opportunity to contradict or contest this in writing before adverse action is taken. In the circumstances of disability determinations, we submit, due process requires no more.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed insofar as it requires an oral hearing before disability benefits can be suspended or terminated.

Respectfully submitted.

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DECEMBER 1971.

APPENDIX A

42 U.S.C. (1970 ed.) 425 provides:

§ 425. Suspension of benefits based on disability.

If the Secretary, on the basis of information obtained by or submitted to him, believes that an individual entitled to benefits under section 423 of this title, or that a child who has attained the age of eighteen and is entitled to benefits under section 402(d) of this title, or that a widow or surviving divorced wife who has not attained age 60 and is entitled to benefits under section 402(e) of this title, or that a widower who has not attained age 62 and is entitled to benefits under section 402(f) of this title, may have ceased to be under a disability, the Secretary may suspend the payment of benefits under such section 402(d), 402(e), 402(f) or 423 of this title until it is determined (as provided in section 421 of this title) whether or not such individual's disability has ceased or until the Secretary believes that such disability has not ceased. In the case of any individual whose disability is subject to determination under an agreement with a State under section 421(b) of this title, the Secretary shall promptly notify the appropriate State of his action under this section and shall request a prompt determination of whether such individual's disability has ceased. For purposes of this section, the term "disability" has the meaning assigned to such term in section 423(d) of this title. When-

ever the benefits of an individual entitled to a disability insurance benefit are suspended for any month, the benefits of any individual entitled thereto under subsection (b), (c), or (d) of section 402 of this title, on the basis of the wages and self-employment income of such individual, shall be suspended for such month. The first sentence of this section shall not apply to any child entitled to benefits under section 402(d) of this title, if he has attained the age of 18 but has not attained the age of 22, for any month during which he is a full-time student (as defined and determined under section 402 (d) of this title).

20 C.F.R. (1971 rev.) Part 404 provides in relevant part:

§ 404.905 Administrative actions that are initial determinations.

* * * * *

(d) *Termination of monthly benefits or periods of disability.* The Administration (or, in a disability claim, a State agency when required by a Federal-State agreement pursuant to section 221(b) of the Act) shall, with respect to a party who has been determined to be entitled to monthly benefits, or a period of disability, make findings, setting forth the pertinent facts and conclusions, and an initial determination as to whether, under the applicable provisions of title II of the Act, such party's entitlement to monthly benefits, or a period of disability, has ended and, if so, the last month of such entitlement or period of disability. Such findings of fact and determination shall be made whenever it appears to the Administration that such party's entitlement to monthly benefits, or a period of disability, has ended. The suspension of benefits pursuant to section 202(t) of

the Act shall be considered to be a termination thereof for purposes of this section.

§ 404.906 Administrative actions which are not initial determinations.

Administrative actions which shall not be considered initial determinations under any provision of the regulations in this Subpart J, but which may receive administrative review, include, but are not limited to, the following:

(a) The suspension of benefits pursuant to section 203(h)(3) of the Act pending investigation and determination of any factual issue as to the applicability of a deduction or deductions under section 203(b) of the Act.

(b) The suspension of benefits pursuant to section 225 of the act pending investigation and determination as to the cessation of the disability of an individual entitled to benefits under section 202(d) or 223 of the act.

* * * * *

(e) The withholding by the Administration in any month, for the purpose of recouping an overpayment, of less than the full amount of the monthly benefit otherwise payable in that month (see § 404.502).

* * * * *

§ 404.907 Notice of initial determination.

Written notice of an initial determination shall be mailed to the party to the determination at his last known address, except that no such notice shall be required in the case of a determination that a party's entitlement to benefits has ended because of such party's death (see § 404.905(d)). If the initial determination disallows, in whole or in part, the application or request of a party, or if the initial determination is to the effect that a husband, widower, or parent was not receiving the requisite support from an insured individual, or that a party's entitlement to benefits has ended, or

that a reduction, deduction, or adjustment is to be made in benefits or a lump sum, or that a period of disability established for a party has terminated, the notice of the determination sent to the party shall state the basis for the determination. Such notice shall also inform the party of the right to reconsideration (see § 404.910) unless such determination is to the effect that a deduction, or, except in disability claims, a termination, is to be made and such determination is based only upon facts reported to the Administration by the party to the determination. Notice of termination because of cessation of disability shall inform the party to the determination of the right to reconsideration, even where the termination was based on a report to the Administration by the party to the determination that his condition improved or that he returned to work.

§ 404.908 Effect of initial determination.

The initial determination shall be final and binding upon the party or parties to such determination unless it is reconsidered in accordance with §§ 404.910–404.916, or it is revised in accordance with § 404.956.

§ 404.909 Reconsideration and hearing.

Any party who is dissatisfied with an initial determination may request that the Administration reconsider such determination, as provided in § 404.910. If a request for reconsideration is filed, such action shall not constitute a waiver of the right to a hearing subsequent to such reconsideration if the party requesting such reconsideration is dissatisfied with the determination of the Administration made on such reconsideration; and a request for a hearing may thereafter be filed, as is provided in § 404.917.

§ 404.910 Reconsideration; right to reconsideration.

The Administration shall reconsider an initial determination if a written request for reconsideration is filed, as provided in § 404.911, by or for the party to the initial determination (see § 404.905). The Administration shall also reconsider an initial determination (unless the determination is with respect to the revision of the Administration's earnings records) if a written request for reconsideration is filed, as provided in § 404.911, by an individual as a wife, widow, divorced wife, surviving divorced wife, surviving divorced mother, husband, widower, child, parent, individual alleging equitable entitlement to a lump sum, or representative of a decedent's estate, who makes a showing in writing that his or her rights with respect to monthly benefits, a lump sum, a period of disability, or entitlement to hospital or supplementary medical insurance benefits, may be prejudiced by such determination. The Administration shall also reconsider an initial determination relating to the revision of the Administration's record of the earnings (see § 404.905 (g)) of a deceased individual if a written request for reconsideration is filed, as provided in § 404.911, by a person as a widow, divorced wife, surviving divorced wife, surviving divorced mother, widower, child, parent, an individual alleging equitable entitlement to a lump sum, or representative of the decedent's estate.

§ 404.911 Time and place of filing request.

The request for reconsideration shall be made in writing and filed at an office of the Administration or, in the case of an individual in the Philippines, at the Veterans' Administration Regional Office in the Philippines or, in the case of an individual having 10 or more years

of service in the railroad industry (see Subpart O of this Part 404) or of an individual entitled to an annuity on the basis of an award under the Railroad Retirement Act prior to October 30, 1951, who requests in writing reconsideration with respect to his application to establish a period of disability under section 216(i) of the act, at an office of the Railroad Retirement Board, within 6 months from the date of mailing notice of the initial determination, unless such time is extended as provided in § 404.612 or § 404.953.

* * * * *

§ 404.914 Reconsidered determination.

The Administration shall, when a request for reconsideration has been filed, as provided in §§ 404.910 and 404.911, reconsider the initial determination in question and the findings upon which it was based; and upon the basis of the evidence considered in connection with the initial determination and whatever other evidence is submitted by the parties or is otherwise obtained, the Administration shall make a reconsidered determination affirming or revising, in whole or in part, the findings and determination in question.

§ 404.915 Notice of reconsidered determination.

Written notice of the reconsidered determination shall be mailed to the parties at their last known addresses. The reconsidered determination shall state the basis therefor and inform the parties of their right to a hearing (see §404.917).

§ 404.916 Effect of reconsidered determination.

The reconsidered determination shall be final and binding upon all parties to the reconsideration unless a hearing is requested in accordance with § 404.918 and a decision rendered or unless such determination is revised in accordance with § 404.956.

§ 404.917 Hearing; right to hearing.

An individual has a right to a hearing about any matter designated in § 404.905, if:

(a) An initial determination and a reconsideration of the initial determination have been made by the Administration; and

(b) The individual is a party referred to in § 404.919 or § 404.920; and

(c) The individual has filed a written request for a hearing under the provisions described in § 404.918.

§ 404.918 Time and place of filing request.

The request for hearing shall be made in writing and filed at an office of the Administration or, in the case of an individual in the Philippines, at the Veterans' Administration Regional Office in the Philippines, or with a hearing examiner, service in the railroad industry (see Sub-or the Appeals Council or, in the case of an individual having 10 or more years of part O of this part) or of an individual entitled to an annuity on the basis of an award under the Railroad Retirement Act prior to October 30, 1951, who requests in writing a hearing with respect to his application to establish a period of disability under section 216(i) of the act, at an office of the Railroad Retirement Board. The request for hearing must be filed within 6 months after the date of mailing notice of the reconsidered determination to such individual, except where the time is extended as provided in § 404.612 or § 404.954.

* * * * *

§ 404.939 Hearing examiner's decision or certification to Appeals Council.

As soon as practicable after the close of a hearing, the hearing examiner, except as herein provided, shall make a decision in the case or certify the case with a recommended decision to the Appeals Council for decision (see

§§ 404.942–404.944). If the hearing examiner makes a decision in the case, such decision shall be based upon the evidence adduced at the hearing (§§ 404.923 to 404.933, inclusive) or otherwise included in the hearing record (see § 404.934). The decision shall be made in writing and contain findings of fact and a statement of reasons. A copy of the decision shall be mailed to the parties at their last known addresses.

§ 404.940 Effect of hearing examiner's decision.

The hearing examiner's decision, provided for in § 404.939, shall be final and binding upon all parties to the hearing unless it is reviewed by the Appeals Council (see §§ 404.948–404.950) or unless it is revised in accordance with § 404.956. If a party's request for review of the hearing examiner's decision is denied (see § 404.947) or is dismissed (see § 404.952), such decision shall be final and binding upon all parties to the hearing unless a civil action is filed in a district court of the United States, as is provided in section 205(g) of the act, or unless the decision is revised in accordance with § 404.956.

§ 404.941 Removal of hearing to Appeals Council.

The Appeals Council on its own motion may remove to itself any request for hearing pending before a hearing examiner. The hearing on any matter so removed to the Appeals Council shall be conducted in accordance with the requirements of §§ 404.924 to 404.938, inclusive. Notice of such removal shall be mailed to the parties at their last known addresses.

* * * * *

§ 404.945 Right to request review of hearing examiner's decision or dismissal.

If a hearing examiner has made a decision, as provided in § 404.939, or dismissed a request

for hearing, as provided in §§ 404.935 through 404.937, any party thereto may request the Appeals Council to review such decision or dismissal.

§ 404.946 Time and place of filing request.

The request for review shall be made in writing and filed with an office of the Administration, or in the case of an individual in the Philippines, with the Veterans' Administration Regional Office in the Philippines, or with a hearing examiner, or the Appeals Council, or, in the case of an individual having 10 or more years of service in the railroad industry (see Subpart Q of this part) or an individual entitled to an annuity on the basis of an award under the Railroad Retirement Act prior to October 30, 1951, who requests in writing review with respect to his application to establish a period of disability under section 216(i) of the act at an office of the Railroad Retirement Board. Such request shall be accompanied by whatever documents or other evidence the party desires the Appeals Council to consider in its review. The request for review must be filed within 60 days from the date of mailing notice of the hearing examiner's decision or dismissal, except as provided in § 404.612 or § 404.954.

* * * * *

§ 404.1520 Determinations of disability.

(a) *By State agencies.* In any State which has entered into an agreement with the Secretary providing therefor, determinations as to whether an individual is under a disability (as defined in § 404.1501), as to the date disability began, and as to the date disability ceases, shall

be made by the State agency or agencies designated in such agreement on behalf of the Secretary with respect to all individuals in such State, or with respect to such class or classes of individuals in the State as may be designated in the agreement.

(b) *By the Administration.* Determinations as to whether an individual is under a disability, as to the date disability began, and as to the date disability ceases, shall be made by the Administration on behalf of the Secretary with respect to individuals in any State which has not entered into an agreement, any class or classes of individuals not designated in such an agreement or any individuals outside the United States.

(c) *Review by Administration of State Agency determinations.* The Administration may review a determination made by a State agency that an individual is under a disability and, as a result of such review, may determine that such individual is not under a disability, or that the disability began on a date later than that determined by the State agency, or that the disability ceased on a date earlier than that determined by the State agency.

§ 404.1521 Initial determinations as to entitlement or termination of entitlement.

After any determination as to whether an individual is under a disability or has ceased to be under a disability, the Administration will make an initial determination (see § 404.905) with respect to entitlement to a period of disability or to disability insurance benefits or child's, widow's or widower's insurance benefits based on disability.

§ 404.1522 Reconsideration, hearing and review.

Reconsideration, hearing and review of any initial determination referred to in § 404.1521 may be requested by a party who is dissatisfied with such determination, in accordance with the provisions of Subpart J of this part (see particularly § 404.909 et seq.). A final decision of the Secretary is subject to judicial review upon the filing of a civil action in a U.S. district court in accordance with section 205(g) of the Act (see § 404.954).

§ 404.1523 Evidence of disability.

An individual who has filed an application for the establishment of a period of disability or for disability insurance benefits or child's, widow's or widower's insurance benefits based on disability, shall submit medical evidence showing the nature and extent of such individual's impairment or impairments during the time he alleges he was under a disability. Upon request, the applicant shall also submit evidence as to his education and training, work experience, and daily activities both prior to and after the alleged date of onset of disability, efforts to engage in gainful employment or self-employment and any other pertinent evidence showing the effect of his impairment or impairments on his ability to engage in any substantial gainful activity during the time he alleges he was under a disability. An applicant for benefits based on statutory blindness shall, upon request, submit evidence as to the skills and abilities required in any gainful activity in which he had previously engaged, the length of time and regularity of such previous work activity, and as to his inability to utilize such skills and abilities in substantial gainful activity (see § 404.1501(a)(1)(ii)).

* * * * *

§ 404.1527 Consultative examinations.

Upon reasonable notice of the time and place thereof, any individual alleged to be under a disability shall present himself for and submit to physical or mental examinations or tests, at the expense of the Administration, by a physician or other professional or technical source designated by the Administration or the State agency authorized to make determinations as to disability. If any such individual fails or refuses to present himself for any examination or test, such failure or refusal, unless the Secretary determines that there is good cause therefor, shall be a basis for determining that such individual is not under a disability. Religious or personal scruples against medical examination or test shall not excuse an individual from presenting himself for a medical examination or test.

§ 404.1528 Evidence of continuation of disability.

An individual for whom a period of disability has been established or who has been determined to be entitled to disability insurance benefits or to child's, widow's or widower's insurance benefits based on disability, upon reasonable notice, shall, if requested to do so, present himself for and submit to examinations or tests as provided in § 404.1527, and shall submit medical reports and other evidence necessary for the purposes of determining whether such individual continues to be under a disability.

* * * * *

§ 404.1531 Responsibility to give notice of event which may effect a change in disability status.

An individual for whom a period of disability has been established or who is entitled to disability insurance benefits or to child's,

widow's or widower's insurance benefits based on disability, shall notify the Administration promptly if:

(a) His condition improves;

(b) He engages in any work activity or there is an increase in the amount of such activity or his earnings therefrom; or

(c) He has been in a hospital or similar institution and is discharged therefrom.

§ 404.1532 Evaluation of work activities.

(a) *In general.* If an individual performed work during any period in which he alleges that he was under a disability as defined in § 404.1501, the work performed may demonstrate that such individual has ability to engage in substantial gainful activity. If the work performed establishes that an individual who is not statutorily blind is able to engage in substantial gainful activity, he is not under a disability. (For the statutorily blind, see paragraph (g) of this section.) Work which does not in itself constitute substantial gainful activity, may nevertheless indicate the existence of a residual capacity of such individual to engage in substantial gainful activity. Thus, an individual who utilizes work skills or abilities on a limited basis may not be under a disability if he is capable of increased utilization of such work skills or abilities.

(b) *Substantial gainful activity defined.* Substantial gainful activity refers to work activity that is both substantial and gainful. Substantial work activity involves the performance of significant physical or mental duties, or a combination of both, productive in nature. Gainful work activity is activity for remuneration or profit (or intended for profit, whether or not a profit is realized) to the individual performing it or to the persons, if any, for whom it is performed, or of a nature generally performed for remuneration or profit. In order for work ac-

tivity to be substantial, it is not necessary that it be performed on a full-time basis; work activity performed on a part-time basis may also be substantial. It is immaterial that the work activity of an individual may be less, or less responsible, or less gainful, than that in which he was engaged before the onset of his impairment.

(c) *Nature of the work.* The performance of duties involving skill, experience or responsibility, or contributing substantially to the operation of an enterprise is evidence tending to show that an individual has ability to engage in substantial gainful activity.

(d) *Adequacy of performance.* The adequacy of an individual's performance of assigned work is also evidence as to whether or not he has ability to engage in substantial gainful activity. The satisfactory performance of assignments may demonstrate ability to engage in substantial gainful activity, while an individual's failure, because of his impairment, to perform ordinary or simple tasks satisfactorily without supervision or assistance beyond that usually given other individuals performing similar work, may constitute evidence of an inability to engage in substantial gainful activity. "Made work," that is, work involving the performance of minimal or trifling duties which make little or no demand on the individual and are of little or no utility to his employer, or to the operation of a business, if self-employed, does not demonstrate ability to engage in substantial gainful activity.

(e) *Special employment conditions.* Work performed under special conditions of employment which take account of the employee's impairment (for example, work in a sheltered workshop or in a hospital by a patient) may, nonetheless, provide evidence of skills and abilities that demonstrate an ability to engage in a

substantial gainful activity, whether or not such work in itself constitutes substantial gainful activity (see § 404.1534 (b) and (c)).

(f) *Activities in carrying on a trade or business.* Supervisory, managerial, advisory or other significant personal services rendered by a self-employed individual demonstrate an ability to engage in substantial gainful activity.

(g) *Work activity of blind applicants.* The work of an applicant for disability insurance benefits who has not attained age 55 and has applied for benefits based on statutory blindness is evaluated to determine whether he is able to engage in substantial gainful activity. If he has attained age 55, his work is evaluated also to determine whether he is utilizing skills or abilities comparable to those of any gainful activity in which he had previously engaged with some regularity over a substantial period of time. If his work establishes that he is able to engage in substantial gainful activity, and (if he has attained age 55) also that he is utilizing such skills or abilities or can utilize them therein, he is not under a disability for the purposes of disability insurance benefits (see § 404.1501 (a)(1)(ii)).

§ 404.1533 Time spent in work.

If the time that an individual spends in work activities is comparable to the time customarily spent by individuals without impairment in similar work activities as a regular means of livelihood, his ability to work for such periods constitutes evidence tending to show an ability to engage in substantial gainful activity. Moreover, where an individual, because of his impairment, is unable to spend as much time in work activities as is customarily spent by individuals without impairment in similar work, but such individual is able to perform significant duties on a part-time basis, his ability to

work on a part-time basis also tends to show an ability to engage in substantial gainful activity.

§ 404.1534 Evaluation of earnings from work.

(a) *General.* Where an individual who claims to be disabled engages in work activities, the amount of his earnings from such activities may establish that the individual has the ability to engage in substantial gainful activity. Generally, activities which result in substantial earnings would establish ability to engage in substantial gainful activity; however, the fact that an individual's activities result in earnings which are not substantial does not establish the individual's inability to engage in substantial gainful activity. Where an individual is forced to discontinue his work activities after a short time because his impairment precludes continuing such activities, his earnings would not demonstrate ability to engage in substantial gainful activity. Also a mentally handicapped individual who performs simple tasks subject to close and continuous supervision would not have demonstrated ability to engage in substantial gainful activity solely on the basis of the rate of his remuneration for such activity. Extraordinary expenses incurred by an individual in connection with his employment and because of his impairmen (e.g., the nature of the impairment requires special transportation) shall be deducted, to the extent that such expenses exceed what would be his work-related expenses if he were not impaired, in computing the value of his earnings. Expenses for medication or equipment which the individual requires whether or not he works would not, of course, be work-related. Earnings received by an employee which are not attributable to his work activity are not considered in determining his ability to engage in substantial gainful activity. Thus, where an individual engages in work activity as an employee under special

conditions (see § 404.1532(e)), only earnings attributable to the individual's productivity, as distinguished from a subsidy related to other factors (e.g., his financial needs), are considered in determining his ability to perform substantial gainful activity. The fact, however, that a sheltered workshop or comparable facility may operate at a deficit and receive some charitable contributions or governmental aid would not necessarily establish that a particular employee of the workshop is not earning the amounts paid to him.

(b) *Earnings at a monthly rate in excess of $140.* An individual's earnings from work activities averaging in excess of $140 a month shall be deemed to demonstrate his ability to engage in substantial gainful activity unless there is affirmative evidence that such work activities themselves establish that the individual does not have the ability to engage in substantial gainful activity under the criteria in §§ 404.1532 and 404.1533 and paragraph (a) of this section.

(c) *Earnings at a rate of $90 to $140 a month.* Where an individual's earnings from work activities average between $90 and $140 a month, consideration of the amount of his earnings together with the other circumstances relating to his work activities (see §§ 404.1532 and 404.1533), the medical evidence relating to his impairment or impairments, and other factors (see § 404.1502) shall determine whether such individual is able to engage in substantial gainful activity. However, in the case of an individual working in a sheltered workshop (such as a workshop especially organized for the blind) or comparable facility, whose activities are limited by his impairment so that his earnings average $140 a month or less, such activities and such earnings ordinarily would not establish the ability to engage in substantial gainful activity.

(d) *Earnings at a monthly rate of less than $90.* Earnings from work activities as an employee which average less than $90 a month do not show that the individual is able to engage in substantial gainful activity. However, an evaluation of the work performed (see § 404.1532) may establish that the individual is able to engage in substantial gainful activity, regardless of the amount of his average monthly earnings.

(e) *Factors considered where individual is self-employed.* The earnings or losses of a self-employed individual often reflect factors other than the individual's work activities in carrying on his trade or business. For example, a business may have a small income or may even operate at a loss even though the individual performs sufficient work to constitute substantial gainful activity. Thus, less weight is given to such small income or losses in determining a self-employed individual's ability to engage in substantial gainful activity, and greater weight is given to such factors as the extent of his activities and the supervisory, managerial, or advisory services rendered by him (see § 404.1532(f)).

§ 404.1536 Period of trial work.

(a) *General.* Any services rendered by an individual entitled to disability insurance benefits, or child's insurance benefits based on disability, during a period of trial work shall nevertheless be deemed not to have been rendered, for the purpose of determining whether such individual's disability ceased during such period of trial work. Services rendered within a period of trial work may be considered, however, in determining whether an individual's disability ceased at any time after the expiration of such period of trial work.

(b) *Widow's and widower's insurance benefits based on disability.* The trial work period

provision described in this section is not applicable in the case of widows and widowers entitled to benefits (based on their disability) under section 202 (e) and (f) of the Act.

(c) *Duration.* A period of trial work for any individual shall begin with the month in which the individual becomes entitled to disability insurance benefits or to child's insurance benefits based on disability: *Provided*, That such period shall not begin earlier than October 1960, or before the month in which application is filed for such benefits, and shall end with the close of whichever of the following calendar months is the earlier:

(1) The 9th month (whether or not consecutive), beginning on or after the first day of such period, in which the individual renders any services, or

(2) The month in which the individual's disability (as defined in § 404.1501(a)) ceases, as determined without regard to work performed during the period of trial work.

(d) *Meaning of "services."* When used in this section "services" means any activity, even though not substantial gainful activity, which is performed by an individual in employment during a period of trial work for remuneration or gain, or which, is determined to be of a type normally performed for remuneration or gain. Work performed without remuneration merely as a therapeutic measure or purely as a matter of training, or work usually performed in daily routine around the home or in self-care, is not considered "services."

(e) *Trial work for certain individuals who have attained age 55 and who are statutorily blind.* An individual who has been determined to be under a disability as defined in § 404.1501 (a)(1)(ii) shall receive cash benefits during a trial work period only if:

(1) The work in which he engages requires skills or abilities comparable to those required

in the work he regularly engaged in prior to blindness or age 55, whichever is later, or

(2) His last previous work ended because of an impairment and the work he engages in requires a significant vocational adjustment.

§ 404.1537 Limitations of eligibility to period of trial work.

(a) *Number of periods of trial work.* An individual is not eligible for more than one period of trial work in any one period of entitlement to disability insurance benefits or child's insurance benefits based on disability.

(b) *Beneficiary who did not serve waiting period.* An individual determined to be under a disability who becomes entitled to disability insurance benefits after previously having been entitled to such benefits which terminated, or to a period of disability which ceased, within the 60-month period preceding the first month in which he is under such disability, and who therefore is not required to serve a waiting period (see section 223(c)(2) of the Act), shall not be eligible for a period of trial work with respect to such entitlement period.

§ 404.1538 Recovery from impairment while working.

An individual's disability may be found to have ceased at any time within a period of trial work (see § 404.1536), if it is determined on the basis of evidence (other than evidence that the individual performed services during such time) that the individual is no longer statutorily blind or has recovered from his physical or mental impairment to the extent that he is no longer prevented by his impairment or impairments from engaging in substantial gainful activity.

§ 404.1539 Cessation of disability.

Where it has been determined that an individual is under a disability as defined in § 404.

1501, the disability shall be found to have ceased:

(a) In the case of an individual entitled to disability insurance benefits or child's insurance benefits based on disability, in the earlier of the following:

(1) The month in which the impairment, as established by the medical or other evidence, is no longer of such severity as to prevent him from engaging in any substantial gainful activity or, in the case of disability under § 404.1501 (a)(1)(ii), no longer constitutes statutory blindness; or

(2) The month in which the individual has regained his ability to engage in substantial gainful activity, or, in the case of disability under § 404.1501(a)(1)(ii), to utilize in substantial gainful activity skills or abilities comparable to those of some gainful activity in which he had previously engaged with some regularity over a substantial period of time, as demonstrated by work activity after application of the provisions in § 404.1536; or

(b) In the case of an individual entitled to widow's or widower's benefits, in the earlier of the following:

(1) The month in which such individual's impairment improves to the point where it no longer constitutes an impairment listed in the appendix to this subpart, or is medically the equivalent thereof: or

(2) The month in which the individual engages in substantial gainful activity.

(c) In any case, where the individual is requested to furnish necessary medical or other evidence or to present himself for a necessary physical or mental examination by a date specified in the request and the individual fails to comply with such request, the month within which the date for compliance falls, unless the secretary determines that there is good cause for such failure.

Where an individual's entitlement to disability insurance benefits is terminated based on a finding that he has regained his ability to engage in substantial gainful activity, a period of disability established for him will continue if he has a visual impairment sufficiently severe to meet the definition of blindness in § 404.1501 (b) (1) (ii) and (2) (ii).

APPENDIX B

The Social Security Administration has compiled the following statistics for fiscal 1971:

A. Total Disability Claims:	
(1) Number of disability claims filed	975,856
Number of disability claims processed	950,571
(2) Number of disability claims allowed initially	393,464
(3) Number of disability claims denied initially	557,107
(4) Number of reconsideration requests filed	148,924
Number of reconsideration requests processed	127,801
(5) Number of affirmances on reconsideration	79,585
(6) Number of reversals on reconsideration	48,216
(7) Number of hearing requests filed	39,800
Number of hearing requests processed	37,589
(8) Number of affirmances on hearing	21,484
(9) Number of reversals on hearing	16,105
(10) Number of requests for Appeals Council review filed	9,664
Number of requests for Appeals Council review processed	8,849
(11) Number of affirmances by the Appeals Council	8,058
(12) Number of reversals by the Appeals Council	791
(13) Number of civil actions filed	1,423
Number of civil actions decided	1,282
(14) Number of district court affirmances	995
(15) Number of district court reversals	190
(16) Number of district court remands (followed by 88A allowance)	297
(17) Other district court dispositions (e.g., dismissals for untimely filing, failure to exhaust administrative remedies)	150
B. Disability Cessations:	
(1) Number of initial determinations of cessation	38,000
(2) Number of requests for reconsideration from cessation determinations processed	10,941
(4) Number of affirmances of cessation on reconsideration	6,885
(4) Number of reversals of cessation on reconsideration	4,056
(5) Number of hearing requests on cessation (processed and pending)	2,330
(6) Number of affirmances at hearing on cessation	890
(7) Number of reversals at hearing on cessation	1,062
Number of reversals at hearing pending	358

B. Disability Cessations—Continued

(8) Number of requests for Appeals Council review on cessation (processed and pending)	**131**
(9) Number of Appeals Council affirmances on cessation	**8**
(10) Number of Appeals Council reversals on cessation	**12**
Number of Appeals Council reversals pending	**111**

APPENDIX C

ROANOKE, VA.,
June 9, 1971.

DISTRICT OFFICE,
Social Security Administration,
Roanoke, Va.

Gentlemen: On this date I accepted a Civil Service Job which pays $8,500 per annum. My Social Security number is 246–12–5511.

In view of the fact that this is my first employment since I was discharged from the V.A. Hospital, Salem, Va., I request that I be allowed to enter into a trial work period for the next nine months.

Sincerely,

JOHN D. ATKINS, Jr.

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